No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY
(a corporation),
Libelant and Appellant,
vs.
DOLBADARN CASTLE SHIPPING COMPANY, LIMITED (a corporation) claimant of the British bark "Dolbadarn Castle", her tackle, apparel and furniture,
Claimant and Appellee.

BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,
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Synopsis of Brief.

Cases Cited.

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I. Statement of the Case.

Libelant is the consignee of consignments of cement and steel plates which arrived in claimant's ship in a damaged condition. The cement, on arrival, was caked, and the steel plates were pitted. The District Court decreed in favor of the ship, and libelant appeals. The following facts are admitted by the pleadings:

1. That about February 19, 1910, at Rotterdam, the shipper shipped, *in good order and condition,* 2775 barrels of *cement,* on the bark "Dolbadarn Castle", then employed as a general ship in the transportation of cargoes, to be transported to San Francisco, there to be delivered in like good order and condition, subject to the terms of the bill of lading (Libel art. II; Ans. art. II).

2. That about the same day, at Rotterdam, the shipper shipped on said bark, *in good order and condition,* 2023 *sheets or steel plates,* to be transported to San Francisco, there to be delivered in like good order and condition, subject to the terms of the bill of lading (Libel art. II; Ans. art. II).

3. That said consignments were *not delivered in like good order and condition,* but *were damaged while the goods were on board and in the custody of said bark* (Answer art. III).

These admitted facts constitute a prima facie case in favor of libelant.

The affirmative *defense* of claimant is set forth in article IV of its answer as follows:

> "IV. The claimant avers that the loss and damage referred to in said libel were *caused solely and entirely by the force of the winds and waves and perils of the sea;* which, notwithstanding that the said bark had been and was up to that time in all respects seaworthy and properly stowed, so injured and strained her that the *seawater* during a long season of tempests and gales was forced through her decks into and upon the cargo referred to, *wetting and damaging the same;* that the master and

crew of said vessel took every precaution for the protection of said cargo, and that the damage thereto was caused by the *act of God,* and without fault on their part or insufficiency on the part of said vessel."

II. Specification of Errors Relied Upon.

The fundamental errors of the Court below consist first, in its ruling that, on the issues raised by the pleadings, *the burden of showing improper stowage is upon the libelant,* and second, in not ordering a decree in favor of libelant for that part of the damage which was not due to sea perils. All the other errors more specifically assigned by appellant (Apostles pp. 317, 318) are the direct consequence of these errors, and appellant relies upon each of the said specified errors.

III. Argument of Appellant.

A. THE BURDEN OF PROOF IS ON CLAIMANT TO SHOW AFFIRMATIVELY THAT THE CAUSE OF THE DAMAGE WAS PERILS OF THE SEA.

1. The questions before the Court are controlled by *The Folmina,* 212 U. S. 354. In that case the principle settled in *Clark v. Barnwell,* 12 How. 272, was reaffirmed to the effect that

> "Where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, *the burden*

> *lies upon the carrier* to show that it was occasioned by one of the perils for which he was not responsible."

In the case at bar the pleadings admit:

(i) that the goods were received in good order on the "Dolbadarn Castle", under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition;

(ii) that the goods were damaged on the voyage.

The case is therefore squarely within the facts upon which the settled principle is predicated, and there can be no doubt that the burden lay upon the claimant to show that the damage was caused by one of the perils for which the claimant was not responsible.

2. This, indeed, was the theory upon which the case was in fact tried. The libelant rested upon its prima facie case made out by the pleadings, relying upon the principle that, "when goods are damaged while in the possession of a ship, there is a prima facie presumption that the injury was caused by the fault of the ship rather than by perils of the sea" (Apostles p. 39). "Our position under the pleadings is, we rest with our prima facie case" (p. 42). Whereupon claimant proceeded with its defense.

3. Claimant's affirmative defense was *that the damage was caused solely by perils of the sea;* that the bark was in all respects seaworthy and prop-

erly stowed; that sea water, entering through the decks of the bark, wetted and damaged the cargo; and that the damage was caused without fault on the part of the master and crew (Answer art. IV). Claimant had, therefore, the burden of proving its defense and to show

First. That the ship was "seaworthy and properly stowed".

Second. That the damage arose from a peril of the sea.

If the evidence, on any of these items of claimant's defense, remains in doubt, the libelant is entitled to a decree in its favor.

As Judge Morrow said, in the case of *The Queen,* 78 Fed. 155, *164:*

> "Can it be said that a carrier against whom a prima facie case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment by simply leaving the question as to whether or not the damage was caused by one of the excepted perils or dangers in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduct how and in what manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt. As was aptly said in The Compta, 14 Sawy. 375, Fed. Cas. No. 3,069:

'The carrier to make good his defense is bound to show that the damage arose from a peril of the sea. It is not enough for him to show that it might have arisen from that cause. He must prove that it did'."

B. THE EVIDENCE FAILS TO SHOW THAT THE DAMAGE WAS CAUSED BY PERILS OF THE SEA.

1. *The evidence on behalf of the claimant fails to show that any of the damage was caused by perils of the sea.*

W. H. Stewart testified that the pitting of the *steel plates* "was in a large measure due to salt water" (p. 45).

Even if this testimony is accepted as true, it contains an admission that some of the damage to the steel plates was not caused by salt water; and it also falls short of proving that the pitting of the steel plates was caused by *perils of the sea.*

Thomas Wallace testified for claimant as to damage to the *cement.* For reasons hereafter stated, his testimony is not entitled to much credit; but even if accepted, it proves little. He says:

"Q. What in your opinion was the cause of the caking?

A. I then made the test immediately on the barrels and on the hoops for salt water.

Q. What did you find?

A. It showed salt water very plainly" (p. 63).

This does not show that he made any examination at all of the cement itself. The Court may take judicial notice of the fact that barrels and hoops coming around Cape Horn in a sailing ship, and stowed directly underneath the hatches, will always show the traces of salt water.

The testimony of these two witnesses is the only direct testimony tending to show that the caking of the cement and the pitting of the plates had *any connection with sea water.*

It is respectfully submitted that this testimony is of the slightest possible weight. Assuming it to be true, it follows, without considering libelant's testimony at all, that *some* of the damage to the steel plates *was* in fact caused by other causes than the cause pleaded in claimant's defense; and that *all* of the damage to the cement may have been caused by causes which do not excuse claimant. Libelant's evidence is insufficient to show even that the damage was caused by *sea water;* a fortiori it is insufficient to prove that it was caused by the excepted cause of *perils of the sea.*

Again, if we assume that the damage to the cement and the steel plates was due to sea water, there was still a failure to prove that the presence of sea water in the ship was occasioned by an accident of the sea, and not by negligence *(The Folmina,* 212 U. S. 354). The captain's theory was that *water going down the ventilators* damaged the plates, and *"water that came through the deck*

damaged the cement'' (p. 230). The mate's testimony, on direct examination, is:

> ''Q. Who attended to the ventilators coming out?
>
> A. I did, as a rule, and the carpenter.
>
> Q. Do you know what was done as to the opening them and closing them? A. Yes, sir.
>
> Q. What was done?
>
> A. I had to cover them at times in bad weather to keep the water from going down, cover them over at the mouth.
>
> Q. *Do you know whether the main ventilator was open at any time during heavy weather?*
>
> A. *Oh, yes, it was opened, and of course water might have gone down before we covered them''* (p. 246).

This testimony of the mate makes it doubtful, to say the least, whether *perils of the sea* had anything to do with the damage to the steel plates. Had libelant not produced any evidence whatsoever on this point, but left claimant at the mercy of its own showing, as disclosed by the pleadings and evidence, libelant would be entitled to a decree.

But the evidence of libelant removes the cause of the damage from the sphere of doubt and shows by clear preponderance that the damage was not produced by sea water, much less by perils of the sea.

The mere fact that the evidence of claimant, when taken alone, leaves the cause of the damage in doubt, entitles libelant to a decree; but when the evidence for libelant is also considered, it appears clearly that the cause of the damage to the cargo

was not any peril of the sea, but the excessive sweat of the coke which was permitted to permeate the general cargo-compartment and was aggravated by insufficient ventilation.

2. *The evidence on behalf of libelant shows clearly that the caking of the cement and pitting of the steel were not caused by perils of the sea (nor even salt water), but by causes for which claimant is not excused. (Coke sweat and poor ventilation.)*

Captain R. F. Pillsbury testified, as a conclusion from his observations and examination as an expert surveyor, that the sweat from the coke produced two-thirds of the damage to the cement, and that the damage to the steel plates was caused *altogether* "by the sweat from the coke, carrying some chemical contained in the coke" (pp. 105, 106). In the opinion of this expert the *means of ventilation* of the general cargo were inadequate, and this fact contributed to the damage (p. 105). "I would put a ventilator in the fore end of the general cargo compartment and one in the aft end" (p. 118). The principal damage to the steel was "pitting", caused by a chemical substance. "I made some tests myself, and the salt reaction on those that I tested was so very slight that I recommended a chemist more expert in such matters than myself to make an examination" (p. 106).

P. W. Tompkins, the chemist employed by libelant, who analyzed the damage, gave the opinion, as

the result of his examination, that "the predominating evidence is against the supposition that the iron plates have been damaged by salt water (p. 187); and that the cement was "unmistakably not salt water damaged" (pp. 177, 178). The pitting of the steel plates was produced by carbon dioxide, in conjunction with water. "Carbon dioxide in the presence of water has a very corrosive effect" (p. 179).

Franklin Riffle, an expert on the nature of steel plates, who had had experience with this class of goods as manager in charge of the iron and steel department of Dunham, Carrigan & Hayden Company, testified that the plates were more or less pitted; that the damage consists in the "pitting" of these goods; that rusting alone is not such damage as makes them unmerchantable. "We accepted all the plates that were not pitted or damaged in any way after removing the rust, scraping it off" (p. 122). The pitting was "all over the plate" (p. 123). "There was evidently some corrosive agency at work there" (p. 123).

Captain Fred G. Wilson, the stevedore who discharged the ship, testified, as his conclusion, based upon his observations in the hold of the ship, with reference to the damage to the cement as follows:

> "The natural sequence of the stevedore would be a supposition it came from the sweat of the coke.
>
> The COURT. Q. Is that the conclusion you came to?
>
> A. The conclusion I came to it was caused by the sweat that rises from the coke" (p. 140).

He also testified on cross-examination:

> "Mr. LILLICK. Captain Wilson from his experience in this port and from his experience from unloading and discharging vessels of the type of the 'Dolbadarn Castle' is able to speak with absolute certainty as to these ventilators * * * I wish to ask him this question:
>
> Q. Are not these vessels of the type and size of the 'Dolbadarn Castle' equipped usually with the same character of ventilator?
>
> A. Well, to the best of my belief these vessels are not properly ventilated for carrying large cargoes of coke and cement and perishable iron; that is to the best of my belief. I mean for that class of vessel * * * (pp. 148-149).

H. L. Van Winkle, an importer of iron and steel who had been engaged in that business for thirty-five years, testified as follows:

> "Q. How did the damage on these particular steel plates compare with the damage which you have known to be created by salt water on steel plates?
>
> A. It seemed to be very much different in that the rust was very black; it was rather different in appearance as salt water rust is rather yellow; this being entirely of a different nature it attracted my attention" (p. 191).

3. *There is furthermore an inherent probability of the correctness of the theory of libelant;*

and a corresponding improbability of the theory upon which claimant relies as a defence. The evidence shows that the damage to both the cement and the steel plates was spread "all over". If

claimant's theory were true, the damage would have been localized; it would have been confined to the cargo underneath the two weak spots in the deck of the ship, viz. under the ventilator, and under the leak in the decks, around the main mast (p. 105). The fact that the damage was distributed throughout the whole compartment is sufficient to disprove the theory upon which claimant's defence is based.

4. *The findings of the Court are insufficient to support the decree.*

a. There is no finding as to the seaworthiness of the ship or the propriety of the stowage.

On the subject of damage the Court's findings are:

> "The damage complained of was the caking of the cement, and the rusting and pitting of the steel plates. This damage of both to the cement and to the steel plates was occasioned by some form of moisture (p. 312). The testimony is very conflicting both as to the cause of the damage and the propriety or impropriety of the stowage. * * * On the whole case I am not prepared to say that the stowage was not proper" (p. 313).

The "*conclusion*" that "part of the damage at least was due to sea water forced through the deck and ventilator and is excused by the exception in the bill of lading covering 'all and every danger and accidents of the seas'" (pp. 313, 314) is a conclusion from the premise that the libelant should have accounted for the cause of the damage. If this

Court agrees with us that, on the authority of the *Folmina* case and numerous other decisions, the premise is incorrect, it follows that the conclusion can have no weight.

b. But if the Court's "conclusion" were considered as an independent finding of fact, it is respectfully submitted that libelant, even under such a finding, is entitled to a decree for that part of the damages which was not due to danger of the seas. If part of the damage was due to sea water and is excused by the exception, it follows by inference that part of the damage was *not* due to sea water and is not within the exception, and therefore not within the defence. For the latter part of the damage libelant is clearly entitled to a decree.

c. Even that part of the damage which may have been due to sea water forced through the deck and ventilator is not covered by the exception of perils of the sea in the absence of a finding or proper evidence of the seaworthiness of the ship. If the sea water was forced through a leaky deck or a defective ventilator, claimant is liable for the consequent damage. Hence for that part of the damage also libelant is entitled to a decree.

C. THE EVIDENCE SHOWS, BY CLEAR PREPONDERANCE, THAT CLAIMANT NEGLIGENTLY FAILED TO SEGREGATE LIBELANT'S PERISHABLE CARGO FROM THE DANGEROUS COKE CARGO BY A SUFFICIENT BULKHEAD.

The voyage round Cape Horn is notorious for extreme weather conditions. A vessel should be

prepared to safely meet these expected conditions, both as to her equipment, and as to the stowage of her cargo. The question of the bark's seaworthiness at the beginning of the voyage is left by claimant largely to presumption and surmise; but on the issue of proper stowage of the cargo the evidence preponderates decidedly in favor of libelant. Claimant, in its pleading, recognizes that it should prove affirmatively "that the said bark had been and was * * * in all respects *seaworthy and properly stowed*" (Answer art. IV). On this subject the Court, in its findings, is "not prepared to say that the stowage was not proper", but *does not find that the stowage was proper.* Assuming *the evidence,* on the subject of proper stowage, to be evenly balanced, the libelant is entitled to a decree; for the whole defence of perils of the sea rests upon the assumption that the ship is seaworthy and able to meet the perils to be expected.

As said in *The Edwin I. Morrison,* 153 U. S. 199, 211:

> "Perils of the sea were excepted by the charter party but the burden of proof was on the respondent to show that the vessel was in good condition and suitable for the voyage at its inception, and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed."

The ship must be seaworthy for that particular voyage and that particular cargo. The evidence, on the issue of the stowage of the cargo for the

intended voyage, is not evenly balanced, but shows by clear preponderance that the cargo was not properly stowed, and that the damage was caused by that fact. The greater part of the cargo was coke, a notoriously dangerous cargo if it comes in connection with perishable cargo like the shipments which were damaged in this case.

The conditions of this case were analogous to those in the case of *The Jean Bart,* 197 Fed. 1002, and the principles followed by Judge Dietrich in the latter case apply to the case at bar. In both "a large quantity of coke constituted a part of the cargo". The Court said:

> "While it is not shown, at least not by direct proof, that it was wet when received, it is well known that coke, by reason of its capacity to absorb moisture under certain conditions and throw it off in the form of vapor under others, *is a most effective and dangerous agency in producing sweat"* (p. 1004).

In both cases the master of the ship was bound to take knowledge of this danger; he knew when he received the other consignment (in the case at bar the steel plates) that it was susceptible to injury from moisture; and that

> "the master and owner were further bound to take cognizance of the fact that the voyage about to be undertaken was * * * the longest commercial voyage of the modern world, in the course of which there are likely to be great and sudden changes of temperature, a condition highly conducive to sweating of hold and cargo. These known conditions imposed the duty to take precautions and to use care rea-

> sonably commensurate with the perils to be anticipated" (p. 1004).

Now what does an examination of the evidence show, in this case, on the issue of stowage?

The Bulkheads.—1. Testimony for the claimant: The only witness who testified as to the proper segregation of general cargo from coke, on behalf of claimant, was Thomas Wallace, who attempted to substantiate his "Port Warden's Certificate", previously issued while employed by the ship. The "expert" testimony of this witness is valueless, as appears from a remark of the Court, made in response to an objection by counsel for claimant:

> "You put this witness on the stand to testify that a single bulkhead with matting was proper stowage to separate coke from other cargo. In the former trial he testified that the only proper way was by double bulkheading and tar paper between" (p. 81).

But even this witness testified that the bulkheads *were not air tight* (p. 68); also that "a ship that contains coke is likely to sweat more than a ship that does not contain coke" (p. 73).

The master of the ship, as might be expected, testified, in his deposition, to the ideal perfection of his bulkheads: "I don't know there was ever bulkheads come into San Francisco in such a perfect condition as ours were" (p. 225). "And arrived here in perfect condition" (p. 226).

The latter testimony was given in the face of the admission of counsel for the ship that "the pitch-

ing or straining of the vessel", going around the Horn, would "absolutely make it impossible to have an air-tight compartment unless it was a part and parcel of the ship" (p. 147).

The ship's *carpenter,* on deposition, testifies that the boards of the bulkhead were not tongue-and-groove, but just laid one on top of the other, nailed to stanchions. He, as a carpenter, is forced to admit that such rough woodwork in houses shrinks and warps, but is very reluctant to admit that it shrinks in bulkheads in the hold of ships, even though they pass twice through the equator on the voyage (pp. 278, 279).

Claimant's expert, Meyer, called for the purpose of showing that air- or water-tight bulkheads are not necessary to protect such cargo as cement or steel against the ravages of coke-sweat, candidly admits: "I only wish they were water and air-tight sometimes" (p. 163).

2. *Testimony for libelant:* Mr. Hilding, employed by libelant, went to inspect the ship upon her arrival. He testifies:

> "I saw the bulkheads and I noticed that the boards, in some places, were not tight, so that in some places you could put your finger through. * * * Furthermore, on top, right below the deck, there was a space probably in some places 3, 4 or 5 inches, between the deck and the bulkhead" (pp. 126, 127).

Captain Wilson, the stevedore who discharged the ship, "saw that there were crevices in the bulkhead

and that the coke was in close proximity to the bulkhead; * * * I saw that the bulkhead was not what we stevedores call a water-tight bulkhead" (p. 139). His conclusion from what he observed in the hold of the vessel was that the damage to the cement was caused "by the sweat that rises from the coke" (p. 140). In his opinion bulkheads should be "put up paper-lined, with oil paper, where they were carrying perishable cargo in close proximity with the coke" (pp. 140, 146).

G. Loken gives it as his opinion, based upon an experience of seventeen years with hundreds of vessels that carried coke cargoes, that the only way safe to other cargo "would be by bulkheading off the coke from the other cargo by good boards, battening it, and tar paper" (p. 154).

W. F. Mills, called as an expert by *respondent,* admitted that the effect of heat, as the vessel passes through the tropics, upon a bulkhead such as described by respondent's evidence, would be to shrink the boards so that it probably would have the effect of making openings between the joints.

> "It would, yes; of course that would depend a great deal upon the thickness of the bulkhead. If it was a thin bulkhead it would have more cause to shrink and swell than it would if it was thick. On 3-inch timbers the heat and moisture would have little effect on the swelling or shrinking" (p. 100).

The evidence shows that the timbers used in the bulkhead were ¾ or 1 inch timbers.

Captain Pillsbury, admittedly an expert on the stowage of cargoes (p. 100), testified that he made a survey of the vessel, and examined the bulkheads separating the cement from the coke (p. 101).

> "I found the bulkheads to be built of ordinary boards, laid one on top of the other, rough boards. I could see spaces where air and moisture and daylight, if the other side were open, so that I could see through it; on top, under the deck, I put my hand in several places where the bulkhead did not fit closely up to the deck" (p. 102).
>
> "I saw a few damaged mats on every bulkhead; some of those were displaced" (p. 103).

This was before the cargo was discharged. The witness testified that the bulkhead was not sweat-tight. As to the nature of coke as a cargo, and the consequent necessity of sweat-tight bulkheads, he says:

> "Many times it produces a very bad sweat, so many times that in my opinion it is dangerous to carry it in the compartment with dry cargo" (p. 104).
>
> "In the most cases that have come under my observation there has been damage to other cargo stowed in the same ship with the coke, caused by the sweating of the coke" (p. 105).

In the opinion of this expert, based upon his personal examination of the cargo, two-thirds of the cement damage, and the whole of the damage to the steel, was caused by the sweat from the coke and insufficient ventilation.

To Summarize.

First: Under the admissions of the answer the burden of proof was on claimant to show that the ship was seaworthy and properly stowed; and that the damage to libelant's cargo was caused by perils of the sea.

Second: The claimant has not shown that the ship was seaworthy and properly stowed.

Third: The claimant has not shown that the damage to libelant's cargo was caused by perils of the sea.

Fourth: The conclusion of the Court that "part of the damage at least was due to sea water" falls short of being a finding that any part of the damage was caused by perils of the sea. Even if it were such a finding, it would by implication admit that *part* of the damage was *not* due to sea water, and therefore not caused by perils of the sea. The latter part of the cargo would, at any rate, not be within the protection of the exceptive clause of the Bill of Lading, and libelant is—from any point of view—entitled to a decree for the latter part.

Fifth: The claimant did not claim in its defence, nor does the Court find, nor does the evidence show, that any part of the damage was caused by ship's sweat or that kind of "sweat" which, within the meaning of the ordinary bill of lading clause, would excuse the ship.

Sixth: The evidence shows, by exceptionally clear preponderance, that the damage to libelant's

cargo was caused directly by coke-sweat, and that the action of the coke-sweat was due to the improper stowage of perishable cargo in the proximity of dangerous cargo, without proper protection of the perishable cargo.

It is respectfully submitted that the decree of the District Court should be reversed, and that a decree should be ordered for libelant for all its damages.

Dated, San Francisco,
February 17, 1915.

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